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Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, PETITIONER

v.

ROBERT PUGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States is filing a brief in this case as *amicus curiae* at the request of the Court.[1] The issue in which the United States has an interest involves the question whether a defendant in custody and awaiting trial on criminal charges pursuant to an information filed by the prosecutor has a constitutional right to a preliminary hearing.[2] The court of appeals

[1] Letter to the Solicitor General from the Clerk of the Court dated May 28, 1974.

[2] The other question involved in this case is whether the district court properly exercised jurisdiction to consider respondents' claims in this class action suit for injunctive and declaratory relief, or whether it should have abstained from exercising jurisdiction for reasons of state-federal comity. We do not discuss that question in this brief because

held that the failure to afford such a hearing before a neutral and detached judicial officer deprives such a defendant of due process of law. Its decision also implies that the detention of the accused under such circumstances constitutes an unreasonable seizure of his person in violation of the Fourth Amendment.

While the decision of the court of appeals was rendered in the context of an attack on the system for initiation and maintenance of prosecutions in the State of Florida, the court's constitutional ruling necessarily has application to the criminal justice system of every jurisdiction in the United States, including the federal system.[3] It would follow from adoption of the court of appeals' ruling that Rule 5(c) of the Federal Rules of Criminal Procedure is unconstitutional insofar as that rule provides that "[a] defendant is entitled to a preliminary examination[4] * * * [which] shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody * * *; *provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set*

its resolution will have little if any impact on the administration of criminal justice in federal prosecutions.

[3] In the federal system and in the Superior Court of the District of Columbia, only misdemeanor prosecutions would be effected, since all felonies necessarily are prosecuted by grand jury indictment. U.S. Constitution, Fifth Amendment. In many States, however, both felony and misdemeanor prosecutions are initiated by information.

[4] Throughout this brief, the terms "preliminary examination" and "preliminary hearing" are used interchangeably.

for the preliminary examination" (emphasis supplied). The Federal Magistrates Act would be similarly affected. See 18 U.S.C. 3060(e).[5]

From a pragmatic standpoint, invalidation of the portion of Rule 5(c) set forth above, and the requirement of preliminary hearings in all cases initiated by information, would have relatively little adverse impact on the general federal criminal justice system. In felony cases, defendants in custody will either receive a preliminary hearing or be indicted by a grand jury, so that detention during the period from arrest to trial cannot be based solely upon the decision of the prosecutor to prefer charges.[6] While there are a substantial and growing number of federal misdemeanor prosecutions, the vast bulk of which are proceeded on by information rather than indictment,[7] the nature of the offenses (few of which involve

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[5] Although not directly addressing the matter, the reasoning of the court of appeals also calls in question the constitutionality of that portion of Rule 9(a) of the Federal Rules of Criminal Procedure which provides that "[u]pon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information * * *," since the rule apparently mandates the issuance of a bench warrant without any review by the court of the probable cause underlying the prosecutor's charging decision.

[6] In more than 10% of felony cases during 1972, indictment was waived by the defendant. 1972 Annual Report of the Director, Administrative Office of the United States Courts II–52. In such instances, presumably, the waiver could properly be viewed as encompassing a waiver of the right, if any such right were recognized in this case, to have the grand jury's probable-cause-determining function performed by a magistrate.

[7] In fiscal year 1972, there were 10,268 misdemeanor cases commenced by information in the federal district courts. 1972

crimes of violence) and of the defendants makes it relatively rare that misdemeanor defendants are held in custody awaiting trial. Thus, the burden of holding preliminary hearings (or securing indictments) in this limited category of cases would not seriously impair the efficient overall performance of the federal criminal justice system.

There would, however, be a serious impact on the functioning of the local criminal justice system in the District of Columbia. Information supplied by the United States Attorney[8] shows that there are currently approximately 6,500 misdemeanor informations filed annually in the Superior Court of the District of Columbia and that defendants are unable to make bond and are therefore incarcerated pending trial in 15–20% of those cases (many of which do involve crimes of violence). Thus, if this Court adopts the holding of the court of appeals, an already overburdened court system would be required to hold between 1,000 and 1,300 additional preliminary hearings per year.

QUESTION PRESENTED

Whether a defendant in custody and awaiting trial on criminal charges pursuant to an information filed by the prosecutor has a constitutional right to a preliminary hearing.

Annual Report of the Director, Administrative Office of the United States Courts, *supra*, at II–52.

[8] The United States Attorney for the District of Columbia serves also in the capacity of local prosecutor for all criminal offenses (with certain exceptions, not relevant here, relating primarily to municipal and police regulations) which are prosecuted pursuant to the District of Columbia Code in the Superior Court of the District of Columbia. See 23 D.C. Code 101.

FEDERAL STATUTE AND RULES INVOLVED

18 U.S.C. 3060 provides in pertinent part:

> (a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.
>
> * * * * *
>
> (d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.
>
> (e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.
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> * * * * *

Rule 5 of the Federal Rules of Criminal Procedure provides in pertinent part:

INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) *In General.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

* * * * *

(c) *Offenses Not Triable by the United States Magistrate.* If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement

made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

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Rule 5.1 of the Federal Rules of Criminal Procedure provides in pertinent part:

PRELIMINARY EXAMINATION

(a) *Probable Cause Finding.* If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) *Discharge of Defendant.* If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

* * * * *

Rule 9 of the Federal Rules of Criminal Procedure provides in pertinent part:

WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) *Issuance.* Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the infor-

mation, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * * * *

STATEMENT

On March 22, 1971, respondents Pugh and Henderson, subsequently joined by intervening respondents Turner and Faulk, filed a class action suit in the United States District Court for the Southern District of Florida against various Dade County, Florida officials, including petitioner Gerstein, the Dade County State Attorney. At the time the suit was filed, respondents Pugh and Henderson were incarcerated in the Dade County Jail upon informations filed by the State Attorney, as permitted by Article I, Section 15(a) of the Florida Constitution. Respondents sought an injunction and a declaration that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial was compelled by the Fourth Amendment and by the Due Process Clause of the Fourteenth Amendment.

On October 12, 1971, the district court issued an opinion and judgment declaring unconstitutional the Florida practice of denying a judicial determination of probable cause to persons proceeded against by in-

formation and concluding that arrested persons, whether or not released on bond, have a constitutional right to a judicial hearing on the question of probable cause (Pet. App. 29–46; 332 F. Supp. 1107). The court directed that a plan for the implementation of its order be submitted (Pet. App. 46; 332 F. Supp. at 1115–1116). Pursuant to the court's order, E. Wilson Purdy, the Director of Public Safety of Dade County, submitted a plan, adopted by the court with modifications on January 25, 1972 (Pet. App. 47–54; 336 F. Supp. 490), which provided for preliminary hearings within four days of initial appearance for those unable to post bond and within ten days for all other defendants (Pet. App. 49; 336 F. Supp. at 491). Petitioner Gerstein appealed to the Fifth Circuit Court of Appeals, and that court stayed the Purdy Plan pending appeal.

Shortly thereafter, the judges of Dade County implemented their own plan for preliminary hearings, under which the State Attorney retained the power, given him by Florida law, to bypass the preliminary hearing by filing an information. The court of appeals thereupon lifted its stay order and directed the district court to make specific findings of fact on the constitutional deficiencies, if any, of the plan implemented by the Dade County judges. Meanwhile, the Supreme Court of Florida amended its Rules of Criminal Procedure to provide, *inter alia,* for preliminary hearings. The amended rules, however, provide that preliminary hearings are available only to those charged with felonies and that persons proceeded against by information filed by the State Attorney are

not entitled to such hearings. Florida Rules of Criminal Procedure, Rule 3.131(a).[9]

On remand from the court of appeals, the district court concluded that the practice that permits the State Attorney to obviate the requirement of a preliminary hearing by filing an information does not afford due process of law and violates the Fourth Amendment; that providing different time limits for preliminary hearings for those charged with capital offenses and offenses punishable by life imprisonment from those set in other cases violates both due process and equal protection; and that the authorization for the State Attorney to refile an information if a defendant is discharged by a judicial officer is a violation of the Fourth and Fourteenth Amendments (Pet. App. 55–69; 355 F. Supp. 1286). The court also concluded that the denial of preliminary hearings to misdemeanants violates the Fourth Amendment and both the due process and equal protection clauses of the Fourteenth Amendment (Pet. App. 60–65; 355 F. Supp. at 1289–1291). Accordingly, it required a judicial probable cause determination for all misdemeanants who face potential imprisonment, but not those charged with violations that carry no possible prison term (Pet. App. 61–62; 355 F. Supp. at 1290).

On August 15, 1973, the court of appeals affirmed the judgment of the district court in substantial part (Pet. App. 1–28; 483 F. 2d 778). The court held that due process requires a preliminary hearing on prob-

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[9] The Rule provides, in pertinent part: "A defendant, unless charged in an information or indictment, has the right to a preliminary hearing on any felony charge against him."

able cause before a judicial officer "when the state attorney prosecutes presently-confined arrestees by filing an information" (Pet. App. 10; 483 F. 2d at 783). It also concluded that "[n]o sufficient justification exists for disallowing preliminary hearings for misdemeanants" (Pet. App. 23; 483 F. 2d at 788). Finally, the court vacated that portion of the district court's judgment relating to two specific sanctions imposed,[10] because it would "not presume that such onerous sanctions" were any longer necessary to insure compliance with the amended Florida Rules of Criminal Procedure as modified by the court's opinion (Pet. App. 28; 483 F. 2d at 790).

This Court granted certiorari on December 3, 1973 (414 U.S. 1062); briefs were filed, and the Court heard argument on March 25, 1974. On April 15, 1974, the Court ordered that the case be restored to the calendar for reargument, and on May 28, 1974, the Court invited the United States and the Attorneys General of the fifty States to file briefs as *amici curiae*.

SUMMARY OF ARGUMENT

1. Our analysis begins with the contention that in criminal cases that may constitutionally be commenced by an information filed by the prosecutor, due process does not require an opportunity for pre-trial

[10] The sanctions were: (1) after a magistrate's finding of no probable cause, the prosecutor only could proceed by grand jury indictment; and (2) if no preliminary hearing were provided within the prescribed time limits, the charges would be withdrawn and the defendant released from custody. The charges could be refiled, but, if twice withdrawn, the prosecutor could only proceed by grand jury indictment. See Pet. App. 51, 53; 336 F. Supp. at 492–493; Pet. App. 27–28; 483 F. 2d at 790.

review of the charging decision by a judicial officer. While the court of appeals focused its concern not on the right of the prosecutor to file charges but on the deprivation of liberty entailed in pre-trial detention, the nature of the remedy selected by the court (a preliminary hearing) undermines this traditional premise of our criminal justice system.

It is established that due process does not require all prosecutions to be initiated by grand jury indictment and that, where authorized by law, an information filed by the prosecutor is a constitutionally permissible method by which to bring a criminal charge. *Hurtado* v. *California*, 110 U.S. 516. Moreover, a prosecutor's information, if valid on its face, is enough to call for a trial of the case on the merits. See *Costello* v. *United States*, 350 U.S. 359, 363. Finally, this Court has consistently held that no preliminary hearing is required by the Constitution prior to the formal accusation by the prosecutor's information. *Lem Woon* v. *Oregon*, 229 U.S. 586; *Ocampo* v. *United States*, 234 U.S. 91; *Beck* v. *Washington*, 369 U.S. 541.

An underlying assumption and natural consequence of these decisions is that, if no hearing is required before the filing of the formal charge (either indictment or information), none can be required after the formal charge is brought, because, historically, the hearing was "preliminary" to the filing of such charges in a court of competent trial jurisdiction. Its limited purpose was to allow the magistrate to determine whether there was then sufficient evidence upon a complaint by a citizen or police official to "bind over" a suspect for later stages of the criminal process pending deter-

mination of whether to file the formal charge. No legitimate purpose is served by a preliminary hearing after the charge has been filed, because the information or indictment itself establishes that the evidence is sufficient to require the suspect to answer the charges against him at trial. See *Costello* v. *United States, supra; Albrecht* v. *United States,* 273 U.S. 1. Moreover, the Court's opinion in *Ocampo* not only supports the proposition that no preliminary hearing need precede the trial, but it also makes clear that the information filed by the prosecutor is sufficient to require the court to issue a warrant to bring the accused before it for trial. See also Fed. R. Crim. P. 9(a); *Albrecht* v. *United States, supra;* cf. *Ex parte United States,* 287 U.S. 241, 249–250.

Conferral of the charging power on the prosecutor, free of pre-trial judicial supervision, is neither unfair nor inconsistent with recent decisions of this Court. Both *Coolidge* v. *New Hampshire,* 403 U.S. 443, and *Shadwick* v. *City of Tampa,* 407 U.S. 345, were concerned with the kind of probable cause determination traditionally made by magistrates preliminary to the issuance of warrants. While there are historical and practical reasons for a magisterial determination of probable cause for a warrant in the investigative phase of a criminal case, assessment of the evidence for sufficiency to support the bringing of formal criminal charges traditionally has been a prosecutorial function (or a function of the prosecutor together with a grand jury, but never of the judiciary).

Nor does *Morrissey* v. *Brewer,* 408 U.S. 471, require a preliminary hearing in the situation

presented here. That case requires only that someone other than the parole officer who has recommended revocation make a preliminary evaluation that there is probable cause to believe that conditions of parole have been violated. In the criminal justice system, this type of preliminary evaluation properly is made by the prosecutor, who reviews the decision of the arresting officer before deciding to submit the case to the grand jury for its consideration or before filing an information. Moreover, in making the decision whether to prefer charges, the prosecutor has both the duty and the natural incentive to assess fairly the relevant factors—the strength of the evidence, the likelihood of conviction and the efficient utilization of limited prosecutorial resources. See ABA Standards for Criminal Justice, *The Prosecution Function*, §§ 3.4(a), 3.9(b), (Approved Draft, 1971).

Even if preliminary hearings are sometimes to be required in cases initiated by information, it is not unconstitutional to differentiate between felony and misdemeanor cases in this regard. *Argersinger* v. *Hamlin*, 407 U.S. 25, does not support a contrary conclusion. *Argersinger* was concerned with the requirements of the Sixth Amendment, which by its terms applies to "all criminal prosecutions." The due process right to a preliminary hearing, on the other hand, necessarily relates to the method by which charges are brought, and the Fifth Amendment itself distinguishes between felony and misdemeanor prosecutions in that regard. Moreover, in considering misdemeanor cases (four to five million annually in the state courts, ten thousand

in the federal courts and 6,500 in the Superior Court of the District of Columbia), it is particularly appropriate to balance the supposed benefit to the accused from a preliminary hearing against the strain on the criminal justice system that will be imposed by diverting overburdened judges, court personnel, lawyers and facilities from the task of speedily disposing of cases at trial. In the case of misdemeanors at least, the due process balance should be struck on the side of speedy trial rather than preliminary hearing.

2. Because the court of appeals' holding was expressly limited to "presently-confined arrestees" (Pet. App. 10; 483 F. 2d at 783), it is clear that the court's concern was with incarceration of defendants pending trial. That being so, the court selected a remedy (the preliminary hearing) which is functionally and historically inappropriate to meet the problem. To the extent that possibly unjustified pre-trial incarceration was its concern, the focus of the court's opinion should have been not on preliminary hearings but on the Florida bail procedures.

Due process is afforded, we submit, when relevant matters concerning the strength of the prosecutor's case can be considered in the course of the bail proceedings. In the federal system and in the Superior Court of the District of Columbia, "the nature and circumstances of the offense charged" and "the weight of the evidence against the accused" are factors considered by the judicial officer in determining appropriate conditions of release pending trial. 18 U.S.C. 3146(b); 23 D.C. Code 1321(b). Since these are the very factors that respondents would have the

judicial officer consider at a preliminary hearing, the bail hearing, though a less formal proceeding, is the functional equivalent of the hearing that respondents seek as a constitutional right. In a weak case, the consideration of these factors nearly always would lead to an accused's release on bond (but, of course, not to dismissal of the charges against him). In the rare case where there appears to be both a weak government case and a strong likelihood of flight before trial, the court, in the exercise of its discretion to control its calendar, may schedule the trial immediately or on an expedited basis. The power of the court in matters of bail and with respect to its calendar thus affords ample judicial control over the problem of potentially unjustified pre-trial incarceration to satisfy the requirements of due-process.

3. Assuming *arguendo* that the bail system is not an adequate check on unwarranted detention of defendants pending trial and that some form of preliminary probable cause determination by a judicial officer is constitutionally required, it does not follow that due process requires adoption of a formal preliminary hearing as the vehicle for this determination.

The magistrate's assessment of probable cause is not inherently the kind of inquiry that requires live witnesses and cross-examination, as is evidenced by the fact that search and arrest warrants are authorized on the basis of *ex parte* applications supported by affidavits (which may be based in whole or in part on hearsay evidence). Due process would be satisfied by a similar procedure for the determination of probable cause after arrest and the filing of an information.

Any probable cause determination which is required could be fairly and efficiently made at the bail hearing, which is much less formal than the preliminary hearing sought by respondents. The determination of probable cause, like bail and sentencing decisions, can be made on the basis of information proffered in open court by counsel (with the judge or magistrate retaining power, in the occasional case where he considers it necessary, to require live witnesses).

Recent due process cases of this Court relied upon by the court of appeals and by respondents [11] do not require a more formalized procedure to determine probable cause. Those cases concerned with a requirement of notice and hearing before what is effectively a final judgment in the case (*Constantineau* and *Stanley*) are obviously inapplicable, because the filing of an information does not represent a final disposition of either the matter of pre-trial detention (considered in the bail proceeding) or the ultimate question of guilt or innocence (resolved at trial). Those cases involving the constitutional validity of temporary deprivations in advance of final judgment (*Sniadach, Goldberg, Bell* and *Fuentes*) were decided in wholly different contexts and involved individualized consideration of the kind of process that is due before a particular deprivation of property takes place. Due process does not always require that notice and opportunity for hearing precede

[11] *Fuentes* v. *Sherin*, 407 U.S. 67; *Stanley* v. *Illinois*, 405 U.S. 645; *Bell* v. *Burson*, 402 U.S. 535; *Wisconsin* v. *Constantineau*, 400 U.S. 433; *Goldberg* v. *Kelly*, 397 U.S. 254; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337.

the taking of property or liberty; indeed, certain decisions may be made *ex parte* and by non-judicial or administrative officers. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, No. 73–157, decided May 15, 1974; *Michell* v. *W. T. Grant Co.*, No. 72–6160, decided May 13, 1974. In the criminal justice system, while an arrest may be made without a warrant by a police officer, the prosecutor then carefully reviews the case brought by the police (cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra*) and determines whether there is evidence sufficient to file a formal charge. Moreover, the bail hearing provides the opportunity for an informal judicial examination of the case and for the restoration of at least conditional liberty pending a final determination of the case on its merits. No comparable procedure for review and protection of the interests at stake existed in any of the cases relied upon by the court of appeals and by respondents.

Finally, our analysis of the requirements of due process necessarily considers the costs to the criminal justice system of requiring preliminary hearings with live witnesses in every case. Such a requirement will divert already overburdened judges, prosecutors, defense lawyers, court personnel and court facilities from the task of speedily disposing of cases. Moreover, the very real problem of securing the cooperation of lay witnesses will be exacerbated by procedures requiring them to spend additional time waiting to testify and actually testifying in court; and law enforcement officers, called to court for such preliminary matters, will be taken away from the active prevention and investigation of crime.

ARGUMENT

In the first part of our argument (pp. 22–47, *infra*), we contend that in criminal cases that may constitutionally be commenced by an information filed by the prosecutor, due process does not require an opportunity for pre-trial review of the charging decision by a judicial officer. We will show that both historically and in terms of its present function, a preliminary hearing is inappropriate once formal criminal charges have been preferred by way of information. Moreover, conferral of the charging power on the prosecutor, free of pre-trial judicial supervision, is neither unfair nor inconsistent with recent decisions of this Court. Finally, we urge that any requirement for preliminary hearings that the Court may recognize, can constitutionally and should appropriately be confined to felony cases.

Our argument in Part II, *infra*, pp. 48–53, is premised on the fact that the court of appeals was concerned not about the right of the prosecutor to prefer charges by information, but about the fact of pre-trial incarceration without the opportunity for a judicial determination whether there is evidence sufficient to support the charge. We contend, however, that due process is afforded when relevant matters concerning the strength of the prosecution's case can be considered in the course of the bail proceedings. Pre-trial release (but not dismissal of the charges) may be appropriate in a weak case.

Assuming, *arguendo*, that the Court concludes that due process requires an independent probable cause

determination by a judicial officer before trial, we contend in Part III, *infra*, pp. 53–67, that other means than the preliminary hearing are permissible to satisfy that requirement. Due process can be afforded by an informal judicial procedure such as that provided by the bail hearing or in reviewing affidavits in support of warrants. Recent due process decisions of this Court do not require a more formal procedure in the nature of a preliminary hearing to determine probable cause. Finally, we suggest that the costs to the criminal justice system of requiring probable cause determination by formal preliminary hearing significantly outweigh the benefits which would accrue.

I

IN CRIMINAL CASES THAT MAY CONSTITUTIONALLY BE COMMENCED BY AN INFORMATION FILED BY THE PROSECUTOR, DUE PROCESS DOES NOT REQUIRE AN OPPORTUNITY FOR PRE-TRIAL REVIEW OF THE CHARGING DECISION BY A JUDICIAL OFFICER

We begin our analysis by showing that the Constitution does not require pre-trial judicial review of the sufficiency of the evidence to support a prosecutor's unilateral determination, solemnized in a formal information filed with the court, that an individual should be required to stand trial to answer criminal charges. While the court of appeals focused its concern not on the onus of trial, but on the deprivation of liberty entailed in pre-trial detention, the nature of the remedy selected by the court to eliminate the risk of unjustified detention (a preliminary hearing) implicitly undermines, in our view, the traditional premise of our criminal justice system that the charg-

ing decision in certain categories of cases (limited to misdemeanors and petty offenses in the federal system) resides with the prosecutor and is not subject to pre-trial judicial review.[12] Having isolated and considered the respective roles of court and prosecutor in the charging decision, including the function of the preliminary hearing, the ground is then cleared to consider (as we do in Part II, *infra*) the problem of pre-trial custody and the nature of the remedies appropriate to minimize the risk of unjustified pre-trial detention.

A. HISTORICALLY AND IN TERMS OF ITS PRESENT FUNCTION, A PRELIMINARY HEARING IS INAPPROPRIATE ONCE FORMAL CRIMINAL CHARGES HAVE BEEN PREFERRED

It has long been established that due process does not require all prosecutions to be initiated by grand jury indictment and that, where authorized by law, an information filed by the prosecutor is a constitutionally permissible method by which to bring a criminal charge. *Hurtado* v. *California,* 110 U.S. 516.[13] More-

[12] Except, of course, that an information, like an indictment, is subject to pre-trial attack on grounds of facial invalidity or through the establishment of certain types of defenses—*e.g.*, statute of limitations, double jeopardy—not entailing an assessment of "probable cause." The availability of this kind of challenge to a criminal charge is not at issue here, nor is the question of the relief available for retaliatory or discriminatory prosecutions.

[13] See also *McNulty* v. *California*, 149 U.S. 645, 648; *Hodgson* v. *Vermont*, 168 U.S. 262, 272; *Bollen* v. *Nebraska*, 176 U.S. 83; *Maxwell* v. *Dow*, 176 U.S. 581; *Dowdell* v. *United States*, 221 U.S. 325, 332; *United States* v. *Pickard*, 207 F.2d 472 (C.A. 9); *Rivera* v. *Government of the Virgin Islands*, 375 F.2d 988 (C.A. 3); *United States* v. *Funk*, 412 F.2d 452, 454–455 (C.A. 8); *Buchannon* v. *Wainwright*, 474 F.2d 1006 (C.A. 5).

over, under current federal practice, "[a]n information may be filed without leave of court." Fed. R. Crim. P. 7(a).[14] Equally accepted hitherto is the proposition that "an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States*, 350 U.S. 359, 363. See also *Lawn* v. *United States*, 355 U.S. 339, 349; *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599. Finally, this Court has stated on numerous occasions that there is no constitutional requirement of a preliminary hearing prior to the initiation of formal criminal charges, whether by indictment (*Goldsby* v. *United States*, 160 U.S. 70, 73; *United States ex rel. Hughes* v. *Gault*, 271 U.S. 142, 149; *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 400), or by information, where the prosecutor is authorized by law to proceed in that manner. *Lem Woon* v. *Oregon*, 229 U.S. 586; *Ocampo* v. *United States*, 234 U.S. 91; *Beck* v. *Washington*, 369 U.S. 541.[15]

[14] This was not always so. See *Albrecht* v. *United States*, 273 U.S. 1. Under the *Albrecht* decision, however, leave of court would be freely granted even though the information was not verified or accompanied by affidavits, for the oath of office of the United States Attorney was deemed "sufficient to give verity to the allegations of the information." *Albrecht* v. *United States*, *supra*, 273 U.S. at 6.

[15] Every circuit court of appeals that has considered the question of whether there is a constitutional right to a preliminary hearing, including the Fifth Circuit prior to this case, has concluded that there is no such right See *Sciortino* v. *Zampano*, 385 F.2d 132, 134 (C.A. 2), certiorari denied, 390 U.S. 906 (indictment); *Government of the Virgin Islands* v. *Bolones*, 427 F.2d 1135, 1136 (C.A. 3) (information); *Barber* v. *United States*, 142 F.2d 805, 807

Respondents argue, however, that while a preliminary hearing may not be required prior to the filing of the formal criminal charge, due process of law requires a determination of probable cause by a neutral and detached magistrate subsequent to the filing of an information. They do not urge that such a hearing is required when the prosecutor proceeds by grand jury indictment (Respondents' Brief, p. 2), although both this Court and Congress have concluded that the indictment and the information are entitled to equal dignity as charging documents (see, *e.g.*, *Costello* v. *United States, supra*),[16] and that no preliminary

(C.A. 4), certiorari denied, 322 U.S. 741 (indictment); *Buchannon* v. *Wainwright*, 474 F.2d 1006 (C.A. 5) (information); *United States* v. *Smith*, 343 F.2d 847, 850 (C.A. 6), certiorari denied, 382 U.S 824 (indictment); *United States* v. *Funk*, 412 F.2d 452, 455–456 (C.A. 8) (information); *United States* v. *Pickard*, 207 F.2d 472, 474 (C.A. 9) (information); *Pearce* v. *Cox*, 354 F.2d 884, 891 (C.A. 10), certiorari denied sub nom. *Charlton* v. *Cox*, 384 U.S. 976 (information); *Crump* v. *Anderson*, 352 F.2d 649, 651–652 (C.A.D.C.) (indictment and information); but see *Brown* v. *Fauntleroy*, 442 F.2d 838 (C.A.D.C.).

State courts that have considered the matter also have concluded that there is no constitutional right to a preliminary hearing. See, *e.g.*, *Washington* v. *State*, 213 Ark. 218, 210 S.W. 2d 307; *State* v. *Mazzadra*, 28 Conn. Super. 252, 258 A. 2d 310; *Smith* v. *O'Brien*, 109 N.H. 317, 251 A. 2d 323; *State* v. *Singleton*, 253 La. 18, 215 So. 2d 838; *State* v. *Jackson*, 43 N.J. 148, 203 A. 2d 1; *Commonwealth* v. *O'Brien*, 181 Pa. Super. 382, 124 A. 2d 666; *State ex rel. Leighton* v. *Henderson*, 448 S.W. 2d 82 (Tenn. Crim. App.); *Benson* v. *Commonwealth*, 190 Va. 744, 58 S.E. 2d 312; *State* v. *Ollison*, 68 Wash. 2d 65, 411 P. 2d 419, certiorari denied *sub nom. Wallace* v. *Washington*, 385 U.S. 874; *Commonwealth* v. *Britt*, 285 N.E. 2d 780 (Mass.); *Shields* v. *State*, 126 Ga. App. 544, 191 S.E. 2d 448. See also *Freeman* v. *Smith*, 301 A. 2d 217 (D.C. App.).

[16] In *Ewing* v. *Mytinger & Casselberry*, *supra*, 339 U.S. at 599, it was said by way of example: "The impact of the initia-

examination is required "if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination." Fed. R. Crim. P. 5(c).[17] See also 18 U.S.C. 3060(e).

The rationale underlying the provisions in the Federal Magistrates Act and the Federal Rules that cut off the right to a preliminary hearing after the filing of the formal charge (indictment or information) is found in the history and purpose of the preliminary hearing.[18] In England, at a time when there was neither a police force nor a public prosecutor, the

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tion of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. * * * The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law."

[17] While this provision was added to the Federal Rules of Criminal Procedure in 1972 in order to conform the Rules with the Federal Magistrates Act of 1968, 82 Stat. 1107, it is consistent with prior law. *See Crump* v. *Anderson*, 352 F.2d at 656 *supra*; *Barrett* v. *United States*, 270 F.2d 772 (C.A. 8).

[18] For an excellent discussion of the history of the preliminary examination, see Staff Memorandum, *Historical Analysis of the Preliminary Hearings*, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on S. 3475 and S. 945 (Federal Magistrates Act), 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 268–271 (hereafter referred to as "Staff Memorandum"). See also Orfield, *Criminal Procedure from Arrest to Trial*, ch. 2, pp. 49–100 (1947); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 Mich. L. Rev. 1361, 1365–1370 (1969).

function of determining whether there was sufficient evidence to warrant placing the defendant on trial was given by statute to the examining magistrate. See Orfield, *supra*, at 67, 99; Staff Memorandum 268.[19] He conducted a "preliminary examination," the purpose of which was to enable him to determine whether there was sufficient evidence to hold a suspect upon a complaint brought by a citizen or police official until a determination was made whether to file a formal charge. The hearing was "preliminary" to the filing of the formal charge in a court of competent trial jurisdiction, and its purpose was to allow the magistrate to determine whether to "bind over" a suspect to the trial court for later stages of the criminal process. See Staff Memorandum 269.[20]

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[19] There was historically no public prosecutor in the English system. The office of the Director of Public Prosecutions was not created until 1879. See Comment, *The District Attorney—A Historical Puzzle*, 1952 Wisc. L. Rev. 125.

[20] Historically, the preliminary examination tended to benefit the prosecution and not the accused. See Orfield, *supra* at 67. It provided an opportunity for the magistrate to "examine" the accused about the charges pending against him and thereby to provide valuable discovery for the prosecution that would ensue. Weinberg & Weinberg, *supra*, 67 Mich. L. Rev. at 1365–1367. "The accused was closely examined in secret, prosecution witnesses were not examined in his presence, he was not permitted to have legal counsel, and he was not entitled to see or hear the evidence against him. Thus the entire proceeding was established for the benefit of the prosecution, and the accused usually benefited only from the setting of bail." Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 Mo. L. Rev. 284, 284 (1970) (footnotes omitted). See also Note, *The Preliminary Examination in the Federal System: A Proposal for a Rule Change*, 116 U. Pa. L. Rev. 1416, 1416–1417 (1968). The preliminary examination was considered important in the English system because the burden of deciding whether or not

That purpose continues in the American criminal justice system.[21] In the federal courts and in the Superior Court of the District of Columbia,[22] when a criminal prosecution is begun by arrest, complaint or summons (Fed. R. Crim. P. 3 and 4),[23] the suspect is brought without unnecessary delay before a magistrate who advises him of the complaint against him,

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the evidence was sufficient to warrant placing the defendant on trial was the function of the examining magistrate. Orfield, *supra*, at 99. In this country, on the other hand, that function is performed by the prosecutor. "The emergence of the professional prosecutor which occurred in the United States * * * provided a new and professional medium of screening which had not previously been available; moreover, it provided continuity in office and experience in the evaluation of evidence to determine the need for prosecution." ABA Standards for Criminal Justic, *The Prosecution Function*, commentary to § 3.4, p. 85 (Approved Draft, 1971).

[21] The current relevant statute is 18 U.S.C. 3060, a part of the Federal Magistrates Act of 1968, Section 303(a), 82 Stat. 1117. The pertinent rules are Rules 5 and 5.1 of the Federal Rules of Criminal Procedure. Rule 5 was amended and Rule 5.1 was added on April 24, 1972, these changes becoming effective on October 1, 1972. In the Superior Court of the District of Columbia, the conduct of preliminary hearings is governed by Rule 5 of the Criminal Rules of the Superior Court. It modifies the Federal Rules (see 11 D.C. Code 946) by providing that preliminary hearings are only available in felony cases. Like the Federal Rules, however, it does provide that no preliminary hearing shall be held if an indictment or information is filed before the time set for the hearing (Super. Ct. Crim. R. 5(c)(2)).

[22] Throughout this discussion, reference is made only to relevant sections of the Federal Rules of Criminal Procedure, except when the Superior Court Criminal Rules deviate in any significant manner from the Federal Rules.

[23] Rule 4–I of the Superior Court Criminal Rules requires that a summons be used instead of an arrest warrant when "a prosecution is terminated by a nolle prosequi or by court dis-

of his rights to counsel and to remain silent, of the general circumstances under which he may secure release on bail, and of his right to a preliminary hearing; the magistrate also admits the defendant to bail as provided by statute or rule. Fed. R. Crim. P. 5(c).[24] The preliminary hearing, as we have noted, is to be held within ten days for defendants in custody and within twenty days for those released, unless in the meantime an indictment or information is filed. *Ibid.*

However, the preliminary hearing is emptied of its normal and traditional purpose if it is held after the filing of either an indictment or an information, the formal charging document. The indictment or information itself establishes probable cause to believe that there is evidence sufficient to require the suspect to

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missal without prejudice and * * * [the prosecutor] elects to re-institute a second or subsequent prosecution against the same party arising out of the same fact situation as the charge which was nolle prossed or dismissed * * * except for good cause shown * * *."

[24] This appearance before the magistrate is the "initial appearance." It is to be distinguished from both the preliminary hearing and the arraignment (which occurs only after the filing of the indictment or information). Rule 5(a) governs the initial appearance and requires only that a person who is arrested be taken "without unnecessary delay before the nearest available federal magistrate" so that he can be advised of his rights. Rule 5.1 governs the preliminary hearing, and Rule 10 governs arraignment. "Although the preliminary examination can be held at the time of the initial appearance, in practice this ordinarily does not occur." Advisory Committee Note to Rule 5 (56 F.R.D. at 148). Despite contrary intimations in both *McNabb* v. *United States*, 318 U.S. 332, 343–344, and *Mallory* v. *United States*, 354 U.S. 449,

answer the charges against him at trial.[25] See *Costello* v. *United States, supra; Albrecht* v. *United States, supra,* 273 U.S. at 6:

> The United States Attorney, like the Attorney General or Solicitor General of England, may file an information under his oath of office; and,

454, the initial appearance is not to show "legal cause for detaining arrested persons (318 U.S. at 344), nor is the next step in the criminal process after arrest "to arraign" the arrested person or to undertake the prompt determination of "probable cause" (354 U.S. at 454). See *Jaben* v. *United States*, 381 U.S. 214, 221, n. 3.

[25] The Federal Magistrates Act was intended to resolve the "confusion surrounding the purpose, conduct, and scope of the preliminary examination." For this reason, "[t]he act explicitly sets forth the purpose of preliminary examination of the accused: Determination whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it." Hearings before Subcommittee No. 4 of the House Committee on the Judiciary, on S. 945, H.R. 5502, H.R. 8277, H.R. 8520, H.R. 8932, H.R. 9970, and H.R. 10841 (Federal Magistrates Act), 90th Cong., 2d Sess. 74 (testimony of Hon. Joseph D. Tydings). To the extent that it once was thought that the preliminary hearing served a legitimate discovery function (see, *e.g., Ross* v. *Sirica*, 380 F. 2d 557 (C.A.D.C.)), "[t]he preliminary hearing provision of the bill operates on the assumption that the problem of pretrial discovery should be treated separately and apart from the preliminary hearing." Hearings on S. 3475 and S. 945, *supra*, at 2–3. See also Weinberg & Weinberg, *supra*, 67 Mich. L. Rev. at 1390–1393; *United States* v. *Milano*, 443 F. 2d 1022, 1024–1025 (C.A. 10); *Coleman* v. *Burnett*, 477 F. 2d 1187, 1198–1200 (C.A.D.C.) Thus, the rationale for the exclusion of petty offenses from the preliminary hearing requirement and, we submit, for the disallowance of a preliminary hearing after indictment or information, "is that the preliminary examination serves only to justify holding the defendant in custody or on bail during the period of time it takes to bind the defendant over to the district court for trial." Advisory Committee Note to Rule 5 (56 F.R.D. at 150). After the formal charge has been filed in the trial court, the preliminary hearing no longer serves any

> if he does so, his official oath may be accepted as sufficient to give verity to the allegations of the information.

Accordingly, once an information is filed by the United States Attorney, the accused can be arrested or brought before the court on summons (Fed. R. Crim. P. 9(a)) and held for trial.[26]

Lem Woon v. *Oregon*, *supra*, *Ocampo* v. *United States*, *supra*, and *Beck* v. *Washington*, *supra*, hold that there is no constitutional right to a preliminary hearing prior to the filing of an information by the prosecutor. The court of appeals concluded that these cases were not controlling here because they did not specifically address the issue of the rights to a preliminary hearing *after* the filing of the information (Pet. App. 12–19; 483 F. 2d at 784–787). We submit that this distinction cannot properly dictate a different result in this case. On the contrary, when read in the

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purpose. There is then no need to determine probable cause to "bind over" the suspect to a competent court of trial jurisdiction, because the indictment or information establishes probable cause and has been returned before a competent court. As this Court said in *United States ex rel. Hughes* v. *Gault*, *supra*, 271 U.S. at 149: "The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge. There he may deny the jurisdiction of the Court as he may deny his guilt, and the Constitution is satisfied by his right to deny it there."

[26] When an arrest warrant is sought before a formal charge has been filed, Rule 4(a) of the Federal Rules of Criminal Procedure governs. Under that Rule, the magistrate independently must satisfy himself from the complaint or from affidavits filed therewith "that there is probable cause to believe that an offense has been committed and that the defendant has com-

context of the historical purpose of the preliminary hearing, there is necessarily implicit in these decisions the assumption that no preliminary hearing is required following the return of an information and before trial. This is so because the preliminary hearing is "preliminary" to indictment or information, not trial. The cases accordingly recognized that the information, once filed in a court of competent trial

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mitted it." If he finds probable cause, he shall issue an arrest warrant.

The Rule 9 warrant is different. After the filing of an indictment or an information, "if it is supported by oath," the court "shall issue a warrant" for the defendant. See *Ex parte United States*, 287 U.S. 241, 249–250; *United States* v. *Funk*, *supra*, 412 F. 2d at 454–455; *Crump* v. *Anderson*, *supra*, 352 F. 2d at 656. Issuance of this "bench warrant" is required merely by virtue of the fact that the indictment or information has been filed. Some commentators disagree with this view, arguing that the *Albrecht* decision upholds only the validity of the information itself based on the prosecutor's oath, but does not justify the issuance of a Rule 9 warrant based on the filing of the information unless affidavits establishing probable cause are filed therewith. See 8 Moore, *Federal Practice*, ¶ 9.02 [2] (Cipes ed., 1974). However, although the 1970 proposed amendment of Rule 9(a) would have required that a warrant issue upon an information only "if it is supported by a showing of probable cause as is required by Rule 4(a)" (48 F.R.D. at 575), that amendment was not adopted. The 1974 amendment to the same rule, promulgated by this Court and now pending before Congress (Pub. L. No. 93–361, 88 Stat. 397, H.R. 15461) contains no such requirement. Under the present proposal, a summons (or if a "valid reason" is shown, an arrest warrant) would issue if there is an information supported by oath. See 62 F.R.D. at 274. While the Advisory Committee suggests that, where a warrant is requested, "good practice would obviously require the judge to satisfy himself that there is probable

jurisdiction, is sufficient to bring the accused before that court and to require him to stand trial on the charges contained in the information.[27]

In *Lem Woon* the question was whether a preliminary hearing was required in cases initiated by information rather than by grand jury indictment, not the timing of the hearing if it was to be held. See 229 U.S. at 590. If the prelminary hearing was not a constitutional condition precedent to the filing of formal charges (as the Court held it was not), then it would serve no legitimate purpose after both the accused and the formal charge were before the trial court. Similarly, the import of the statement regarding preliminary hearings in *Beck* v. *Washington, supra,* 369 U.S. at 545, is that a prosecution can be initiated and proceed to trial on an information filed by the prosecutor without a judicial determination of probable cause.[28]

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cause" (*ibid.*), it cites no authority for this proposition. There is, however, abundant authority to the contrary. See *Albrecht* v. *United States, supra; Ocampo* v. *United States, supra*; *Crump* v. *Anderson, supra; United States* v. *Funk, supra;* cf. *Ex parte United States, supra.*

[27] Once the information is filed, "the issues of probable cause and guilt become merged and tried together." *United States* v. *Funk, supra,* 412 F. 2d at 455. See also *Rivera* v. *Government of the Virgin Islands, supra,* 375 F. 2d at 990; *United States* v. *Smith,* 343 F. 2d 847 (C.A. 6), certiorari denied, 382 U.S. 824; *Roddy* v. *United States,* 296 F. 2d 9 (C.A. 10); *United States* v. *Pickard, supra*; *Crump* v. *Anderson, supra,* 352 F. 2d at 656; *Freeman* v. *Smith, supra.*

[28] Further support for the view that an information properly may be filed and the accused thereby required to answer the charges at trial is found in Rule 5.1(b). That Rule provides that while a magistrate "shall dismiss the complaint and discharge the defendant" if he finds no probable cause at the

Ocampo v. *United States, supra,* not only supports the proposition that no preliminary hearing need precede the filing of an information and trial of the cause on the merits, but it also makes clear that the information filed by the prosecutor, at least when supported by his oath, is sufficient to require the court to issue a warrant to bring the accused before it for trial. See also Fed. R. Crim. P. 9(a); *Albrecht* v. *United States, supra; Crump* v. *Anderson, supra,* 352 F. 2d at 656; *United States* v. *Funk, supra,* 412 F. 2d at 454–455; cf. *Ex parte United States, supra,* 287 U.S. at 249–250.[29] In *Ocampo,* a case arising under the constitution and laws of the Philippine Islands, the defendants were charged by an information subscribed and sworn to by the prosecuting attorney, who also filed sworn affidavits that he had conducted a "preliminary investigation" of the facts of the case. Upon the filing of these affidavits and the information,

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preliminary hearing, "[t]he discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense." See also 18 U.S.C. 3060(d). Accordingly, respondents' reliance on one of Chief Justice Marshall's opinions in the Aaron Burr case is unwarranted (Respondents' Brief, p. 17). While the Chief Justice found insufficient evidence of high treason at the preliminary hearing to commit Burr, he commented that this ruling assumed little importance "because it detracts nothing from the right of the [United States] attorney to prefer an indictment for high treason, should he be furnished with the necessary testimony." *United States* v. *Burr,* 25 Fed. Cas. 2, 15 (C.C.A. Va.).

[29] Under the present rules, an oath is not required for the filing of an information, which may be done without leave of court (Fed. R. Crim. P. 7), but is only required when an arrest warrant is sought (Fed. R. Crim. P. 9(a)). See note 26, *supra.*

the court issued arrest warrants, and the accused parties were thereupon brought before the court, given a copy of the information, and advised of the charges against them. It was urged in this Court that they had a right to a preliminary examination before the Court, rather than an *ex parte* examination by the prosecutor, and that the warrant, issued solely upon the filing of the information and affidavits, had not been issued "upon probable cause, supported by oath or affirmation." The Court rejected these arguments (234 U.S. at 100–101):

> It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally * * * as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest * * *. In short, the function of determining that probable cause exists for the arrest of a person accused is only *quasi*-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal. * * * [S]ince [the statute] does not prescribe how "probable cause" shall be determined, it is, in our opinion, as permissible for the local legislature to confide this duty to a prosecuting officer as to entrust it to a justice of the peace. Consequently, a preliminary investigation con-

ducted by the prosecuting attorney of the City of Manila, under Act No. 612, and upon which he files a sworn information against the party accused, is a sufficient compliance with the requirement "that no warrant shall issue but upon probable cause, supported by oath or affirmation." [30]

B. CONFERRAL OF THE CHARGING POWER ON THE PROSECUTOR, FREE OF PRE-TRIAL JUDICIAL SUPERVISION, IS NEITHER UNFAIR NOR INCONSISTENT WITH RECENT DECISIONS OF THIS COURT

The court of appeals discounted the continuing vitality of *Ocampo's* clear statement of the constitutionality of vesting the charging decision in the prosecutor rather than the court, relying principally in this regard on what it perceived to be the thrust of three recent decisions of this Court—*Coolidge*, *Shadwick*, and *Morrissey*—to the effect that the prosecutor is not an appropriate person to make a "probable cause" determination (Pet. App. 17; 483 F. 2d at 786). We now show that the cases relied upon by the court of appeals concerned a materially different question from that presented here and did not impair the continuing vitality of the *Lem Woon-Ocampo-Beck* line of cases, and further that it is not unfair or otherwise violative of due process to vest the charging power in the prosecutor.

Coolidge v. *New Hampshire*, 403 U.S. 443, 453 held

[30] While, as respondents note (Respondents' Brief, p. 29), the prosecutor's information and supporting affidavit in *Ocampo* were "made before the judge of the Court of First instance, who thereupon issued warrants of arrest" (234 U.S. at 93), it is clear from the opinion that the judge's decision to issue the warrant

that a state Attorney General who was both "the chief investigator and * * * [the] prosecutor" in a case was not sufficiently neutral and detached that he could constitutionally be permitted to make the probable cause determination that is a necessary antecedent to the issuance of a search warrant. *Shadwick* v. *City of Tampa*, 407 U.S. 345, ruled that a clerk of the municipal court is qualified to issue arrest warrants for violations of municipal ordinances, and, in passing, distinguished such an official from police or prosecution with regard to the elements of detachment and neutrality. The suggestion, of course, is that the prosecutor is likewise disqualified from making the "probable cause" determination that justifies putting the accused to trial. But the equation is too facile. Although the standard, both under the Fourth Amendment and in our case, is articulated in terms of "probable cause," there are significant differences between the two situations.

In part because both the danger of abuse and the consequences are very different,[31] the law has always

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was not an independent one. It rested solely on the fact that the prosecutor had filed an information accompanied by an affidavit stating that he had investigated the facts of the case and was satisfied that there was probable cause. So it is today that, under the federal rules, the magistrate must independently determine probable cause for a warrant sought before indictment or information (Fed. R. Crim. P. 4(a)), whereas after the filing of an indictment or information "supported by oath" the court "shall issue a warrant" based solely upon the fact that a formal charge has been filed. Fed. R. Crim. P. 9(a); see note 26, *supra*.

[31] The probable cause determination made by the magistrate at a preliminary hearing concerns whether the evidence is sufficient at that time to believe that a criminal offense was probably committed

distinguished the kind of probable cause determination involved in *Coolidge* and *Shadwick* from the kind involved in our case.

The determination of probable cause justifying a search or seizure has, in our system, traditionally been a judicial function, whereas assessment of

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and that the accused probably committed it. These questions are distinct from the issue of whether there was probable cause to arrest the accused at the outset, and the invalidity of the initial arrest neither compels a finding of no probable cause at the preliminary hearing nor, as we have shown, can it deprive a court of jurisdiction to conduct the criminal trial once a formal accusation by indictment or information is before it. See *Albrecht* v. *United States*, *supra*, 273 U.S. at 8; *Frisbie* v. *Collins*, 342 U.S. 519, 522. If the arrest of the accused was unlawful, his only remedy in the course of the criminal prosecution is the suppression of any evidence that was seized as a direct result of the unlawful arrest; if no evidence was obtained therefrom or if the evidence was obtained "by means sufficiently distinguishable to be purged of the primary taint'" (*Wong Sun* v. *United States*, 371 U.S. 471, 488), there is no remedy and the case must proceed to trial. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365; *M.A.P.* v. *Ryan*, 285 A. 2d 310, 315 (D.C. App.).

Indeed, while Rule 5 of the Federal Rules of Criminal Procedure provides that when a person arrested without a warrant is brought before a magistrate a complaint must be filed which complies with Rule 4(a) as it relates to a showing of probable cause (Fed. R. Crim. P. 5(a)), the failure to file the complainant does not invalidate an otherwise valid arrest or a search incident thereto. 1 Orfield, *Criminal Procedure under the Federal Rules*, § 5.72, p. 320 (1966). Nor does the Rule require a probable cause determination at the time the complaint is filed, or the release of the person arrested if it later develops that there was no probable cause for arrest. The portion of the proposed 1970 amendment to Rule 5 which would have required an *ex parte* probable cause determination by the magistrate upon the filing of the complaint was not made a part of the amended Rule as promulgated. See 48 F.R.D. at 562–563, 566.

the evidence for sufficiency to support the bringing of criminal charges has traditionally been a prosecutorial function (or a function of the prosecutor together with a grand jury,[32] but never of the judiciary). This division between the investigative and the charging stages of the criminal justice process is a sensible one. The concerns regarding the likely fairness of the prosecutor during the investigative phase are substantially attenuated once the investigation has been completed; for, in making the decision whether to prefer charges, the prosecutor has both the duty and the natural incentive to assess fairly the relevant factors—the strength of the evidence supporting the charge, the likelihood of conviction, and the efficient utilization of limited prosecutorial resources.[33] See ABA Standards for Criminal Justice, *supra*, §§ 3.4 (a), 3.9(b); *Smith* v. *United States*, 375 F. 2d 243, 247 (C.A. 5); *Pugach* v. *Klein*, 193 F. Supp. 630, 634–635 (S.D.N.Y.).

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[32] Most matters considered by the grand jury are brought to it by the prosecutor. Moreover, a grand jury cannot return an indictment in the absence of the agreement of the United States Attorney that the case should be prosecuted, which he indicates by signing the indictment. *United States* v. *Cox*, 342 F. 2d 167, 171 (C.A. 5), certiorari denied, 381 U.S. 935.

[33] During the oral argument in this case last Term, there was some suggestion in the questioning of counsel for the State that the prosecutor might lack the requisite neutrality to make a fair assessment of the sufficiency of evidence against a suspect because it would later be his job to prosecute the case. (*E.g.*, Transcript of Oral Argument, p. 30.) We suggest, however, that the prosecutor's knowledge that he must try the case if he elects to prefer charges is a major incentive *against* proceeding in weak or borderline cases, and accordingly supports the fairness

Nor does *Morrissey* v. *Brewer*, 408 U.S. 471, relied upon by the court of appeals (Pet. App. 15–17; 483 F. 2d at 785–786), require a preliminary hearing in the situation presented by this case. *Morrissey* and the related decision in *Gagnon* v. *Scarpelli*, 411 U.S. 778, require only that someone other than the parole or probation officer who has recommended revocation make a preliminary evaluation that there is probable cause to believe that the conditions of parole or probation have been violated. This is necessary because "[t]he officer directly involved in making recommendations cannot always have complete objectivity in evaluating them" (408 U.S. at 486). However, "[t]his independent officer need not be a judicial officer" (*ibid.*); even another parole or probation officer may make the probable cause determination (*ibid.*; 411 U.S. at 782, 786).

In the pre-trial stage of the criminal justice system, the police or other law enforcement officer makes the arrest and often causes the complaint to be filed. He then recommends to the prosecutor that a formal charge be instituted. The prosecutor, much like the second parole or probation officer in *Morrissey* and *Gagnon*, carefully reviews the recommendation of the arresting officer and the supporting evidence before

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of the traditional procedure. The same deterrent does not operate during the investigative phase of the case, when prosecutor and police are both likely to have an interest in obtaining evidence and (apart from the possible impact of the exclusionary rule) there may be little pressure on the prosecutor to prohibit unjustified searches.

deciding to submit the case to the grand jury for its consideration or before filing an information in open court. "The charging decision is the heart of the prosecution function" (ABA Standards for Criminal Justice, *supra,* commentary to § 3.9, p. 93), and in performing that responsibility the prosecutor does "not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." ABA Code of Professional Responsibility, Disciplinary Rule 7–103(A). For the prosecutor's interest in a criminal case "is not that [he] shall win a case, but that justice is done." *Berger* v. *United States,* 295 U.S. 78, 88. See also ABA Standards for Criminal Justice, *supra,* §§ 1.1, 3.4 and commentary; *United States* v. *Cox, supra,* 342 F.2d at 190–193 (Wisdom, J., concurring).

Respondents' reliance on *Morrissey* and *Gagnon,* like their reliance upon *Coolidge* and *Shadwick,* fails to acknowledge that the prosecutor filing a formal criminal charge stands in a very different posture from the police officer involved in the investigation of criminal activity. Not only do tradition, history and his oath of office support the exercise by the prosecutor of the charging function, but there also are practical checks on its abuse: the necessity of proving his case beyond a reasonable doubt, the likelihood of winning a unanimous jury verdict of guilty, the limitations upon prosecutorial resources, and witness reluctance and credibility. See ABA Standards for

Criminal Justice, *supra*, § 3.9; *Pugach* v. *Klein*, *supra*, 193 F. Supp. at 633–634.[34] "If competent and experienced lawyers, after screening processes involving several layers of independent professional appraisal, conclude that a case should proceed, it is not unreasonable to assume that there is a strong case against the accused." ABA Standards for Criminal Justice, *supra*, commentary to § 3.4, pp. 84–85.[35] The principles of *Morrissey* and *Gagnon* do not require the imposition upon the criminal justice system of a formalized preliminary hearing to assure the fairness of the prosecutor's screening function and of his decision that

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[34] The available empirical evidence indicates that prosecutors take most seriously their responsibility to bring criminal charges. They seek to make even-handed judgments by requiring that charging decisions be reviewed by more than one prosecutor and by articulating internal office guidelines for the exercise of prosecutorial discretion in the charging decision. See Kaplan, *The Prosecutorial Discretion—A Comment*, 60 N.W. U. L. Rev. 174 (1965). In at least one jurisdiction, the District of Columbia, modern computer technology has been brought to bear to assure that the prosecutor does not accept every matter presented to him and that he screens matters based on uniform policy guidelines. See Hamilton & Work, *The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness*, 64 J. Crim. L. & Crim. 183 (1973).

[35] The effectiveness of the screening function can be measured by the infrequency of acquittals in those cases which are taken to trial. See ABA Standards for Criminal Justice, *supra*, commentary to § 3.4, p. 84. In fiscal year 1974, for example, the United States Attorney for the District of Columbia declined prosecution in 23% of the cases brought to him by the Metropolitan Police Department for prosecution in the Superior Court of the District of Columbia. Of those cases which he processed as misdemeanors, one in seven were enrolled in various types

there is probable cause to file a charge in a particular case. Cf. *United States* v. *Bland*, 472 F. 2d 1329, 1337 (C.A.D.C.), certiorari denied, 412 U.S. 909.[36]

The court of appeals' conclusion that a post-information preliminary hearing is required embraces an expansive notion of due process under which the criminal defendant must be granted two separate hear-

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of pre-trial diversionary programs, such as employment training and drug treatment, and were ultimately dismissed. As a result of his careful screening, his acquittal rate was less than 9%. In the Southern District of New York at the time of the *Pugach* opinion, 97% of all prosecutions commenced by the prosecutor ended in either a plea of guilty or conviction after trial, an indication to the court of "[j]ust how thoroughly cases are screened." *Pugach* v. *Klein*, *supra*, 193 F. Supp. at 635.

[36] In *Bland*, the Court of Appeals for the District of Columbia Circuit concluded that due process was not violated by a statute which authorized the United States Attorney, in his discretion, to determine whether to prosecute 16 and 17 year olds as adults rather than to treat them as juveniles. It concluded that no adversary hearing was required before the prosecutor could make that decision (472 F. 2d at 1337): "We cannot accept the hitherto unaccepted argument that due process requires an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom. Grave consequences have always flowed from this but never has a hearing been required." See also *Cox* v. *United States*, 473 F.2d 334 (C.A. 4), certiorari denied, 414 U.S. 869. Moreover, it has been said that "few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Newman* v. *United States*, 382 F. 2d 479, 480 (C.A.D.C.). See also *Smith* v. *United States*, *supra*, 375 F. 2d at 247; *United States* v. *Cox*, *supra*, 342 F. 2d at 171: *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F. 2d 375, 380 (C.A. 2); *United States* v. *Kysar*, 459 F. 2d 422 (C.A. 10).

ings, "a kind of preliminary trial to determine the * * * adequacy of the evidence" before the prosecutor at the time he filed the charges (*Costello* v. *United States, supra,* 350 U.S. at 363), and the trial itself.[37] Sound due process analysis requires, we suggest, that the costs of such a rule in its impact on the fair and effective overall operation of the criminal justice system be weighed against the anticipated benefits. Thus, in balancing the arguable benefits to a defendant from a judicial probable cause hearing with the more substantial benefits of a speedy and fair trial, with all of its procedural safeguards, it would seem counterproductive at this time to take already overburdened trial judges and magistrates away from the task of speedily disposing of criminal cases through pleas and trial[38] by requiring them to conduct "mini-

[37] It does not follow, as respondents argue (Respondents' Brief, p. 19), that because this Court has extended the rights of cross-examination (*Pointer* v. *Texas*, 380 U.S. 400) and counsel (*Coleman* v. *Alabama*, 399 U.S. 1) to preliminary hearings, there is necessarily a constitutional right to the hearing itself. Mr. Justice White intimated that there was no constitutional right to a preliminary hearing in his concurring opinion in *Coleman:* "[R]equiring the appointment of counsel may result in fewer preliminary hearings in jurisdictions where the prosecutor is free to avoid them by taking a case directly to a grand jury. Our ruling may also invite eliminating the preliminary hearing system entirely" (399 U.S. at 17–18).

[38] The goal of speedy trials, though sometimes elusive, is an important one both in Florida and in the federal system. In the United States District Court for the District of Columbia, for example, "[a]ll indictments shall be returned within 45 days of arrest, except for good cause shown"; "[a]rraignments shall be held within two weeks of indictment, except for good cause

trials", very few of which, experience shows, would result in a determination of no probable cause.[39]

C. ANY REQUIREMENT FOR PRELIMINARY HEARINGS SHOULD BE CONFINED TO FELONY CASES

We submit that the court of appeals erred in concluding that the Equal Protection Clause mandates application of its ruling requiring preliminary hearings to misdemeanors as well as to felonies. Its analogy to *Argersinger* v. *Hamlin*, 407 U.S. 25, is unpersuasive. The Sixth Amendment right to counsel in-

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shown"; "[a]ll indictments returned shall be tried within 180 days from return of indictment if the defendant is on bond, or shall be tried within 90 days from return of indictment if the defendant is in jail solely for failure to make bond for the indicted offense" [except "for good cause shown"]; and [a]ll federal misdemeanor cases shall be tried within 90 days of the filing thereof, except for good cause shown" (Crim. R. 2-7; U.S. Dist. Ct. for D.C.).

Under the Florida rule, every person who makes a specific demand for a speedy trial shall be brought to trial within 60 days, and if no demand is made, "every person charged with a crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor, or within 180 days if the crime charged be a felony, capital or noncapital, and if not brought to trial within such time shall * * * be forever discharged from the crime * * *." Florida Rules of Criminal Procedure, Rule 3.191(a)(1) and (a)(2).

[39] Respondents suggest that the preliminary examination, if required, would protect substantial rights. However, as the State of Washington points out in its *amicus* brief (Washington Brief, pp. 15-20), this contention is not borne out by reality. At a preliminary hearing each party seeks to reveal as little of its case as possible, magistrates tend to review the evidence in a cursory manner and then rely upon the prosecutor to make the correct charging decision, both prosecutors and defense counsel have had too little time to investigate their case and prepare for

volved in *Argersinger* applies by its terms to "all criminal prosecutions." On the other hand, the due process right to a preliminary hearing (if it exists at all) necessarily relates to the method by which criminal charges are brought, and the Fifth Amendment to the Constitution itself prescribes different methods for initiating felony and misdemeanor prosecutions. Moreover, "[t]he law has traditionally and constitutionally discriminated between procedural safeguards guaranteed for felonies and those involved in lesser offenses." *United States* v. *Funk, supra,* 412 F. 2d at 455.

Thus, in deciding whether a constitutional right to a preliminary hearing should be recognized for misdemeanor cases, it is particularly appropriate to balance the supposed benefit to the accused against the strain upon the criminal justice system that will be

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the hearing, and defendants make no serious efforts to obtain dismissal in most cases because they do not view the bind-over-or-dismissal decision as a realistic purpose of the hearing. *Id.* at 15–17. See generally Miller, *Prosecution: The Decision to Charge a Suspect with a Crime*, chs. 4–5, pp. 64–109 (1969). See also Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 Mo. L. Rev. 281, 289–290 the preliminary hearing is a sufficiently useful evidence screening device as to make its availability a matter of constitutional imperative" (Washington Brief, p. 16). Despite the observation by the court of appeals that preliminary hearings have reduced caseloads in Florida (Pet. App. 21; 483 F. 2d at 787), the experience in the District of Columbia, as apparently in Wisconsin, Michigan and Kansas (see Miller, *supra*), has been more consonant with the observations of the State of Washington in its brief. See note 41, *infra*.

imposed by taking already overburdened court personnel and facilities away from the task of speedily disposing of cases at trial in order to provide preliminary hearings.[40] Misdemeanor cases go to trial sooner than do felonies,[40a] and, because the potential penalty is less, the "ordeal" of trial is diminished. Thus, the American Law Institute has recognized that "[t]he huge volume of misdemeanor cases renders it impractical to require for these cases judicial screening in the form of a preliminary hearing as is done in felony cases." ALI, *A Model Code of Pre-Arraignment Procedure* (Tent. Draft No. 5, April 25, 1972), note on § 330.8, p. 50. The distinguished National Advisory Commission on Criminal Justice Standards and Goals agrees:

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[40] In fiscal year 1972, there were 10,268 misdemeanor cases commenced by way of information filed in the federal district courts, an increase of 61.5% over fiscal year 1971. 1972 Annual Report of the Director, Administrative Office of the United States Courts *supra*, at II—52. Moreover, as we noted at the outset of this brief, there are approximately 6,500 misdemeanor cases filed each year in the Superior Court of the District of Columbia, virtually all by way of information rather than by complaint. Finally, as Mr. Justice Douglas observed in *Argersinger* v. *Hamlin*, *supra*, 407 U.S. at 34, n. 4, there are annually between four and five million misdemeanor cases (exclusive of traffic offenses) brought in the United States. Even if preliminary hearings were required only in those cases where the accused is incarcerated pending trial (15–20% in the District of Columbia), the strain upon existing courtroom facilities, magistrates, judges, prosecutors, defense counsel, court clerks and stenographers would be incalculable. See, *e.g.*, Note, *The Functions of the Preliminary Hearing in Federal Pretrial Procedure*, 83 Yale L.J. 771, 789–790, nn. 82, 83 (1974).

[40a] See note 41, *infra*.

> Given the minor penalties that may be assessed for conviction of a misdemeanor, such prosecutions need not involve the complexities of a felony case. This standard suggests methods of simplifying the processing of misdemeanor cases.
>
> Since a misdemeanor trial will occur quickly and its burden is significantly less than that of a felony trial, the Commission believes that the preliminary hearing—and the protection it may afford against an unjustified trial—is not necessary in misdemeanor cases.

National Advisory Commission on Criminal Justice Standards and Goals, *Courts,* commentary to Standard 4.3, p. 73 (1973). In the case of misdemeanors, at least, the due process balance should be struck on the side of speedy trial rather than preliminary hearing, particularly in light of the minimal benefit likely to accrue to the accused as the result of affording him a preliminary hearing.[41]

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[41] The magistrate finds a lack of probable cause in a very small proportion of cases in which a preliminary hearing is held—less than four percent, for example, in felony cases in the Superior Court of the District of Columbia. Even in those cases where there is a finding of no probable cause, of course, the prosecutor is free to pursue the prosecution by filing an information or seeking a grand jury indictment. See Fed. R. Crim. P. 5.1(b); 18 U.S.C. 3060(d).

In the case of the large majority of accused persons as to whom the magistrate would confirm the prosecutor's charging decision (some of whom will nevertheless be acquitted at trial despite the existence of probable cause), the requirement of a preliminary hearing would entail a significant penalty by diverting judicial and prosecutorial resources that would other-

II

DUE PROCESS IS AFFORDED WHEN RELEVANT MATTERS CONCERNING THE STRENGTH OF THE PROSECUTION'S CASE CAN BE CONSIDERED IN THE COURSE OF BAIL PROCEEDINGS

Much of what the court of appeals said in its opinion pointed in the direction of a general holding that criminal defendants charged by means of an information have a constitutional right to pre-trial judicial review of the sufficiency of the evidence to support the charges against them. We have contended in the previous section that a broad holding of this nature would be both unsound and contrary to established precedent. But whatever may be the undercurrents of the court's decision, it in fact expressly limited its holding to "presently-confined arrestees" (Pet. App. 10; 483 F. 2d at 783) and did not relieve defendants who had been able to secure pre-trial release from the burden of standing trial on charges preferred by an unreviewed information.[42]

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wise be available to speed the ultimate determination of their case. In the first three-quarters of fiscal year 1974 the Superior Court of the District of Columbia, for example, 60.8% of all misdemeanor cases were disposed of in less than 45 days from arrest to trial or plea, and 85.8% in less than 90 days. This record of prompt disposition obviously could not be maintained if preliminary hearings were first required in all such cases.

[42] The fact that the court limited its holding to presently-confined arrestees makes clear that the problem which it perceived was detention pending trial and not the power of the prosecutor to bring an accused to trial on an information. Thus, the appropriate relief upon a finding of no probable cause should be pretrial release on bail rather than dismissal of the charges.

Working backward from the kind of relief requested by respondents and granted by the court of appeals, the question to be decided in this case may be stated as follows: What kind of process, if any, is due an incarcerated defendant, awaiting trial on charges preferred by a prosecutor's information, in order to minimize the risk that he is being held in custody to answer charges lacking adequate factual support? We believe that the court of appeals selected a remedy, the preliminary hearing, which is functionally as well as historically inappropriate to meet the problem it perceived, detention of defendants in custody pending trial. To the extent that possibly unjustified pretrial incarceration was its concern, the focus of the court's opinion should have been not on preliminary hearings but on the Florida bail procedures.

Historically, the bail determination and the probable cause determination were distinct. As we have shown, the purpose of the preliminary examination was for the magistrate to determine, preliminary to the filing of a formal charge, whether sufficient evidence existed to "bind over" the suspect to a court of competent jurisdiction for later stages of the criminal process. The bail decision was a separate step in the process: the "next step to the preliminary inquiry held by the magistrate is the discharge, bail, or com-

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But see Pet. App. 51; 336 F. Supp. at 492. Were this otherwise, persons in custody would have the opportunity to have the charges against them dismissed while those on bond would face trial regardless of the validity of their arrests or the sufficiency of the evidence against them.

mital of the suspected person." Stephen, *A History of the Criminal Law of England* 223 (1883).[43]

If it is constitutionally permissible for the prosecutor to make the charging determination free of pretrial judicial supervision—and the court of appeals did not purport to challenge that proposition—then it would appear to follow that there must be the related power to require the defendant's appearance at the trial. See, *e.g.*, *Stack* v. *Boyle*, 342 U.S. 1, 4. Where that can be reasonably assured consonant with his release from custody, the bail system effects his release, and the problem with which this case is concerned does not arise. It is only when it cannot be so assured that the problem exists, and the remedy, it appears to us, resides in a bail system structured to take into account the strength of the case against the defendant in making the bail determination, together with a system of speedy trials that gives highest priority to in-custody defendants."[44]

In Florida, all persons except those charged with a capital offense or a "life" offense as to which "the

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[43] The Wickersham Crime Commission stated: "After arrest, or after binding over, or after indictment, or again pending appeal, the accused may be admitted to bail, i.e., may be released from custody upon giving security for appearance in court at the required time." National Commission on Law Observance and Enforcement, *Report on Criminal Procedure* 16 (1931). See Orfield, *supra*, at 101.

[44] The Federal Rules give priority to in-custody defendants. Fed. R. Crim. P. 50(b). See note 38, *supra*. However, as we previously have noted (*supra* note 41 and text at pp. 43–44, 46–47), the requirement of a preliminary hearing would interfere to some extent with the ability of the criminal justice system to provide speedy trials.

proof of guilt is evident or the presumption is great" are entitled "as of right" to be admited to bail before conviction. Florida Rules of Criminal Procedure, Rule 3.130(a). After the initial bail hearing before the magistrate (*id.*, Rule 3.130(b)(1)), subsequent applications for bail may be made to the trial court (*id.*, Rule 3.130(c)(1) and (f)), and if the trial court fixes bail and thereafter refuses to reduce it before trial, the defendant may institute habeas corpus proceedings seeking reduction of bail, in connection with which he is able to obtain review of the trial court's bail decision. *Id.*, Rule 3.130(c)(2).

In the federal system and in the Superior Court of the District of Columbia, pre-trial release on personal recognizance or other specified non-financial conditions is required in non-capital cases unless the judicial officer determines that such release will not reasonably assure the appearance of the accused. 18 U.S.C. 3146 (a); 23 D.C. Code 1321(a); see H. Rep. No. 1541, 89th Cong., 2d Sess. 10.[45] The conditions of release are reviewed promptly (18 U.S.C. 3146(d) and (e); 23 D.C. Code 1321(d) and (e)) and may be appealed (18 U.S.C. 3147; 23 D.C. Code 1324).[46] Among the

[45] The only significant distinctions between the federal and District of Columbia bail systems are (1) that the judicial officer in the District of Columbia may also consider "the safety of any other person or the community," although he may not impose any financial condition on the basis of that consideration (23 D.C. Code 1321(a)), and (2) that the District of Columbia Code provides for preventive detention in certain limited classes of cases (23 D.C. Code 1322, 1323). Neither of these distinctions is relevant here.

[46] Thus, although the initial bail hearing may precede the filing of the information, that action in no way impedes the

factors that are considered by the judicial officer in selecting conditions of release to assure the appearance of the defendant at trial are "the nature and circumstances of the offense charged" and "the weight of the evidence against the accused" (18 U.S.C. 3146(b); 23 D.C. Code 1321(b)). Since these are the very factors that respondents would have the judicial officer consider at a preliminary hearing, the bail hearing, though a less formal proceeding, is the functional equivalent of the hearing that respondents seek as a constitutional right.

To the extent that the strength of the government's case is related to likelihood of flight and thus to continued incarceration pending trial, as it undoubtedly is (see, *e.g., Stack* v. *Boyle, supra,* 342 U.S. at 5 and n. 3), it is much more appropriate that it be considered in a bail hearing and not in a separate and additional preliminary hearing to establish probable cause. In a weak case, the consideration of this factor nearly always would lead to an accused's release on personal recognizance (but, of course, not to dismissal of the charges against him). Moreover, in the rare case where there appears to be both a weak government case and a strong likelihood of flight before trial, the court, in the exercise of its discretion to control its calendar, may and properly should schedule the trial immediately or on a highly expedited basis. The exercise of

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subsequent opportunity of the defendant to obtain further review of the necessity for his detention pending trial. Indeed, the relevant statutes specifically require review within twenty-four hours of the initial bail decision (18 U.S.C. 3146(d); 23 D.C. Code 1321(d)) and allow for subsequent review thereafter (18 U.S.C. 3146(e); 23 D.C. Code 1321(e)).

discretion in this way would be consonant with the federal rule emphasizing prompt disposition of cases in which defendants have been deprived of their liberty pending trial (Fed. R. Crim. P. 50(b)), as well as with the Florida rule which requires a speedy trial upon demand, for felonies and misdemeanors alike, within 60 days (Florida Rules of Criminal Procedure, Rule 3.191(a)(2)).[47] See also ABA Standards for Criminal Justice, *Pretrial Release* (Approved Draft, 1968), § 5.10.

The power of the court in matters of bail and with respect to its calendar thus affords ample judicial control over the problem of potentially unjustified pre-trial incarceration to satisfy the requirements of due process.

III

IF DUE PROCESS IS DEEMED TO REQUIRE AN INDEPENDENT PROBABLE CAUSE DETERMINATION BY A JUDICIAL OFFICER, OTHER MEANS THAN THE PRELIMINARY HEARING ARE PERMISSIBLE TO SATISFY THAT REQUIREMENT

A. DUE PROCESS IS SATISFIED BY AN INFORMAL JUDICIAL PROCEDURE SUCH AS THAT PROVIDED BY THE BAIL HEARING OR IN REVIEWING AFFIDAVITS IN SUPPORT OF WARRANTS

By ignoring the role of the courts in considering bail and in controlling the scheduling of trials, the decision below proceeded, in effect, on the premise that the prosecutor enjoys essentially unrestrained power to accomplish the pre-trial detention of persons

[47] In Florida a speedy trial is required without demand within 90 days in misdemeanor cases and within 180 days in felony cases, upon pain of dismissal. Florida Rules of Criminal Procedure, Rule 3.191(a)(1). See note 38, *supra*.

accused in criminal informations. As we have shown in the preceding discussion, however, the propriety of such detention is a matter that is basically under the control of the court rather than the prosecutor, and, at least in the federal system, this control encompasses the power of the court to examine in a meaningful fashion the strength of the government's case in deciding whether and how long an accused will be subjected to pre-trial incarceration. The degree of judicial control available is thus more than sufficient to guard against unwarranted incarceration resulting from prosecutorial abuse in the exercise of the charging decision. We believe that due process requires no more.

Two objections could be raised to this conclusion: (1) While the bail and calendar powers of the judiciary may give it the actual power to control the problem of detention in connection with prosecutions brought without adequate factual basis, the device of the preliminary hearing would *require* the courts to review the prosecutor's "probable cause" determination and thus insure exercise of the judicial power; and (2) defendants should enjoy the benefit of live witnesses and opportunity for cross-examination inherent in the preliminary hearing procedures, rather than having probable cause considered in the more informal procedures by which bail and calendar matters are handled. We submit that such objections are not valid.

The first objection is flawed because it overlooks the nature of the supposed evil that gives rise to this controversy—the power of a prosecutor, who is deemed not to be neutral and detached, to make a unilateral

determination of probable cause resulting in the incarceration of a defendant to await trial. No one has yet suggested that the Florida system is constitutionally defective because of a failure of the judiciary to utilize existing powers to control prosecutorial abuses where they are found to exist—on the contrary, the entire litigation has proceeded on the assumption (erroneous, we submit) that the judiciary is without power in the absence of a preliminary hearing. Thus, even though there may be no specific requirement of an express judicial finding of probable cause on review of the determination made by the prosecutor in filing an information, due process is satisfied when the pre-trial release or detention of the accused is determined by a neutral and detached magistrate having the power to inquire into the strength of the government's case.

But even assuming that a particular criminal justice system (unlike the federal system) does not in fact afford adequate opportunity for this kind of judicial supervision, or that this Court determines that due process requires a specific judicial finding of probable cause in the case of in-custody defendants proceeded against by information, it would be wrong to adopt the preliminary hearing as the constitutionally mandated means of providing the required judicial supervision. There would, for example, appear to be no reason why probable cause must be determined in this separate, additional proceeding rather than having the determination incorporated in the bail hearng. Given the diversity of pre-trial procedures among the fifty States (and even within individual States), due process should not be held to require

any particular solution. Rather, the constitutionality of any individual system should be tested by examining the adequacy of the means that system employs to minimize the risk that accused persons will be unjustifiably detained in custody to answer criminal charges lacking adequate factual foundation.[48]

Apart from this, there remains the question of the procedures that are constitutionally required in connection with a judicial determination of probable cause. At the heart of respondents' contentions is the notion not only that it must be a neutral and detached magistrate (or a grand jury) who assesses probable

[48] While we have not attempted to survey the various States regarding prosecutors' screening procedures or the use of preliminary hearings, grand jury indictments and informations, it is clear from the *amicus* briefs filed in this case that few areas of criminal procedure are more divergent from State to State. Indeed, practices often differ from county to county within a particular State. See, *e.g.*, ABA Standards for Criminal Justice, *supra*, § 2.2 and commentary; Note, *Prosecutors' Discretion*, 103 U. Pa. L. Rev. 1057, 1059–1064 (1955). Accordingly, respondents' invitation to announce that preliminary hearings are constitutionally required causes concern, because such a decision necessarily would apply not only to procedures in the State of Florida but also to procedures in every county and every State across the Nation. This Court "do[es] not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement" (*Argersinger* v. *Hamlin*, *supra*, 407 U.S. at 38), and it has recognized that the "federal system warns of converting desirable practice into constitutional commandment" because "plural and diverse state activities [are] one key to national innovation and vitality." *Shadwick* v. *City of Tampa*, *supra*, 407 U.S. at 353–354. In this context, it cannot be concluded, we submit, that there need be imposed a particular, inflexible procedural requirement upon every State and county in order for the diverse procedures of the various court systems to pass constitutional muster.

cause, but that this must be done in a relatively formal proceeding, such as the preliminary hearing, involving live witnesses and cross-examination. In light of the purpose of the probable cause determination, the existence of other safeguards, and a comparison of the limited benefits that can reasonably be anticipated from such formalized procedures as against their cost in terms of the effective functioning of other parts of the criminal justice system, we think it clear that due process, even if it requires some form of specific judicial determination of probable cause following the filing of an information, does not demand the procedures respondents seek.

In this connection, we note first that a magistrate's assessment of probable cause is not inherently the kind of inquiry that requires live witnesses and cross-examination. Search and arrest warrants are issued by magistrates on the basis of *ex parte* applications supported by affidavits (which may, in the federal system, be based in whole or in part on hearsay evidence). In cases that are commenced by the suspect's arrest pursuant to a warrant issued by the magistrate after a finding of probable cause (*e.g.*, under Fed. R. Crim. P. 4) and in which the prosecutor thereafter prefers charges by information, we find it hard to believe that due process would mandate a second judicial review of probable cause (apart from or in addition to the kind of inquiry to be made regarding bail). In cases where the magistrate is examining probable cause for the first time after the filing of an information, there is no need for the procedures to be any more formal or inflexible

than when he considers affidavits in support of an arrest or search warrant.

Due process is, after all, basically a matter of assuring that the procedures utilized are fundamentally fair in the particular circumstances. It "is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed." *Gagnon* v. *Scarpelli, supra,* 411 U.S. at 788. In the particular circumstances of the issue before the Court in this case, any probable cause review of the prosecutor's determination can fairly be made in proceedings of considerable informality, such as those that apply to bail hearings in the federal system.

Both the federal and the District of Columbia bail statute provide that the bail determination shall be based on "available information" (18 U.S.C. 3146(b); 23 D.C. Code 1321(b)) and that the information offered "need not conform to the rules pertaining to the admissibility of evidence in a court of law" (18 U.S.C. 3146(f); 23 D.C. Code 1321(f)). They leave the judicial officer free to take testimony or not, as he sees fit. In practice, the information relating to the bail determination generally is supplied informally by the accused or his attorney, the prosecutor, and the probation department of the court, a local bail agency or the public defender. It is presented through oral representations in court, reports from appropriate agencies, and letters, memoranda or other pleadings in support of release. In the District of Columbia at least, the practice has been that judicial officers almost always base their bail determinations "upon information proffered by the prosecutor, defense counsel, and the District of Columbia Bail Agency. Only rarely

does a judge require sworn testimony." Rauh & Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970,* 20 Amer. U. L. Rev. 252, 293 (1970–1971).[49]

These informal procedures are—quite properly, we submit—deemed constitutionally adequate to deal fairly with the important question of bail. The very same individual interest upon which the court of appeals focused in the instant case (freedom from unjustified or unnecessary pre-trial detention) is at stake in the bail proceeding. If bail may be handled flexibly and informally (as it must if the criminal justice system is not to break down), why may not judicial review of the prosecutor's probable cause determination be similarly treated? Indeed, an even more substantial liberty interest is at stake in the area of sentencing of criminal defendants, yet even there

[49] Those who have been most concerned about insufficient information being available to the judicial officer at the time he sets bail have not found fault with a courtroom proceeding in which information is supplied informally by proffer, reports from bail projects and law enforcement agencies, statements by the probation department, questionnaires completed by the defendant, data supplied by the prosecutor, and the like. See, *e.g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, on H.R. 3576–3578, H.R. 5923, etc. (Federal Bail Reform), 89th Cong., 2d Sess. 44; Hearings before Subcommittee on Constitutional Rights and Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on S. 2838, S. 2839 and S. 2840 (Federal Bail Procedures), 89th Cong., 2d Sess. 223–224; Freed & Wald, *Bail in the United States: 1964*, pp. 56–61 (A Report to the National Conference on Bail and Criminal Justice, Washington, D.C. 1964). The concern uniformly has been with the quality and quantity of the information obtained and verified by the time the accused arrives in court for the bail hearing, not the manner in which the information is received and evaluated by the court.

due process does not require live witnesses and cross-examination. *Williams* v. *New York*, 337 U.S. 241. A holding that procedures of such formality are required by due process to review the probable cause determination underlying a criminal information, we submit, would have revolutionary implications for many aspects of the criminal justice process.[49a]

B. RECENT DUE PROCESS DECISIONS OF THIS COURT DO NOT REQUIRE A FORMAL PROCEDURE IN THE NATURE OF A PRELIMINARY HEARING TO DETERMINE PROBABLE CAUSE.

In holding that a preliminary hearing is required to test the prosecutor's probable cause determination, the court of appeals relied (Pet. App. 20; 483 F. 2d at 787), as do respondents here (see note 11, *supra*), on this Court's decisions in *Fuentes* v. *Shevin*, 407 U.S. 67; *Stanley* v. *Illinois*, 405 U.S. 645; *Bell* v. *Burson*, 402 U.S. 535; *Wisconsin* v. *Constantineau*, 400 U.S. 433; *Goldberg* v. *Kelly*, 397 U.S. 254; and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337. We do not dispute the proposition that respondents' interest in pretrial freedom from incarceration is every bit as substantial as the interests at stake in those cases. Nevertheless, none of those cases supports the conclusion that the procedures followed in depriving respondents of their liberty fell short of the requirements of due process.

While each case must be viewed on its own facts, the cases cited can be separated roughly into two cate-

[49a] We are not suggesting that the judge should be deemed powerless to require live witnesses when he is not satisfied with the showing of probable cause that the prosecutor is able to make by less formal means. But that should be a matter for his discretion (as it is in bail hearings) to be used only when necessary, and not a matter of absolute right for the defendant.

gories: those concerned with a requirement of notice and hearing before what is effectively the final judgment or action in the case, and those concerned with the requirements of due process in connection with some initial or preliminary deprivation of liberty or property in advance of final judgment. *Constantineau* and *Stanley* fall into the first category.[50] These decisions obviously are inapplicable here because the hearing that respondents seek, a "preliminary" hearing, is not tantamount to a final judgment either on the question of pre-trial deprivation of liberty, which properly is a matter for the bail hearing, or on the ultimate question of guilt or innocence, which is resolved at trial. So far as that

[50] In *Wisconsin* v. *Constantineau*, the Court held that due process was violated by a regulation permitting the police chief to post a notice forbidding the sale of liquor to a specific named person on the basis of a history of excessive drinking. This action was not preliminary to some judicial proceeding; indeed, so far as appears from the Court's opinion, Wisconsin provided no avenue for review of the police chief's action either prior or subsequent to the posting of the notice. This Court understandably held that due process requires notice of intent to post such a notice and an opportunity to present the "posted" individual's side of the case before this "badge of disgrace" attached and was made public.

The statute involved in *Stanley* v. *Illinois* provided that an unwed father's children would automatically be taken from him upon the death of their mother, on the mere proof that the father and mother had not been married; fitness as a father was irrelevant. The Court held that due process required a hearing before a man's children could be taken from him; the fact that he later could apply for adoption or for custody of his children was no substitute for such a hearing. The state rule in *Stanley* irrationally excluded considerations of fitness in taking away the children; needless to say, a prosecutor is not precluded from considering evidence of guilt in deciding whether to file an information.

final judgment is concerned, indeed, the accused is afforded much more, not less, procedural protection than in any of the cases relied upon by respondents.[51]

The second category of cases relied upon by respondents (*Sniadach, Goldberg, Bell* and *Fuentes*) involved temporary deprivations in advance of final judgment and thus were to that extent analogous to the instant case.[52] The question presented in each instance concerned the kind of process that is due before the deprivation takes place. See also *Arnett* v. *Ken-*

[51] He is given notice of the charges against him by way of an indictment or information; he is provided with the opportunity to retain counsel or, in the case of indigency, to have counsel appointed; he is given a speedy and public trial by an impartial jury at which he may testify if he chooses, call witnesses in his behalf, and confront and cross-examine witnesses against him; he is presumed to be innocent and can put the government to its burden of proving his guilt beyond a reasonable doubt. The trial itself thus affords the due process of law which is required in the criminal setting. As this Court has said: "[D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Frisbie* v. *Collins*, *supra*, 342 U.S. at 522. See also *United States ex rel. Hughes* v. *Gault*, *supra*, 271 U.S. at 149; 1 Orfield, *Criminal Procedure under the Federal Rules*, *supra*, § 5.6, p. 225.

[52] In *Sniadach* v. *Family Finance Corp.*, the Court held that due process was violated by Wisconsin's pre-judgment garnishment procedure, under which wages were frozen by the filing of a complaint with the clerk of the court by the creditor's lawyer. While wages later could be unfrozen if the wage earner was successful at a trial on the merits, the Court held that notice and hearings are required prior to the interim "taking" of the property. In *Goldberg* v. *Kelly*, the Court held that notice and an evidentiary hearing were required prior to the termination of welfare benefits. However, it stated that "the pre-

nedy, No. 72–1118, decided April 16, 1974. Resolution of such a question turns upon the nature of a person's interest in the right involved, the harm caused by the deprivation, any countervailing interests of the State or others that may be implicated, the duration of the deprivation, and the procedures available to contest the deprivation in a final hearing or proceeding. While in general due process requires notice, hearing, an opportunity to be heard and the right to confront and cross-examine witnesses, it does not always require that the notice and hearing precede the taking; indeed, certain decisions may be made *ex parte* and by non-judicial or administrative officers.[52a]

Thus, last Term, in *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* No. 73–157, decided May 15, 1974, the

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termination hearing need not take the form of a judicial or quasi-judicial trial" (397 U.S. at 266), does not require counsel, and need not be followed by formal findings of fact and conclusions of law (*id.* at 270–271). This was because the statutory post-termination hearing would provide the recipient with full administrative review. Moreover, "prior involvement in some aspects of the case will not necessarily bar a welfare official from acting as a decision maker" (*id.* at 255). *Bell* v. *Burson,* is discussed at note 54, *infra.* In *Fuentes* v. *Shevin,* it was held that due process was violated by replevin statutes which authorized the issuance of writs of replevin upon a creditor's bare assertion that he was entitled to the property. While the Court in *Fuentes* held that the particular statutory procedures resulted in a deprivation of property without due process because they failed to provide for hearings "at a meaningful time"—in that case, prior to the seizure (407 U.S. at 80)—the Court reaffirmed that due process does not always require an opportunity for prior hearing (407 U.S. at 91).

[52a] "[T]he guaranty of a hearing found in the due process clause of the Fifth Amendment has traditionally been limited to judicial and quasi-judicial proceedings. It has never been held applicable to the processes of prosecutorial decision-making." *Cox* v. *United States, supra,* 473 F. 2d at 336.

Court held that the Puerto Rican forfeiture statute satisfied due process by providing for post-seizure notice and hearing. The case was distinguished from *Fuentes* because the statute involved in *Calero-Toledo* furthered the public interest in preventing continued illicit use of property and in enforcing criminal sanctions, because pre-seizure notice and hearing would create a risk of removal of the property from the jurisdiction, and because, "unlike the situation in *Fuentes,* seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes" (slip op., p. 16).[53]

In the criminal justice system, while an arrest may be made (often without a warrant) by a police officer who then files a complaint in court, this is only the first step in the process. The prosecutor then carefully reviews the case and, like the administrative official in *Calero-Toledo,* determines whether there is evidence sufficient to file a formal charge. Indeed, as we have shown, the nature of a prosecutor's responsibilities to the administration of justice, his legal training, and the natural incentives he has to avoid consuming limited prosecutorial resources on

[53] The extent to which *Fuentes* reflects principles that are properly to be given broad application in substantially different contexts is called in question by the decision last Term in *Mitchell* v. *W. T. Grant Co.*, No. 72–6160, decided May 13, 1974, in which the Court found that due process was satisfied by a sequestration statute that permitted a seller to obtain a sequestration order from a judge simply by filing, *ex parte*, a complaint and an affidavit where a hearing would follow the seizure.

weak cases assure that he is likely to provide much greater protections to the rights of the individual than would the official entrusted with the decision in *Calero-Toledo*. Moreover, the bail hearing provides the opportunity for an informal judicial examination of the case and for the restoration of at least conditional liberty pending a final determination of the case on its merits. No comparable procedure for review and protection of the interests at stake existed in any of the cases relied upon by the court of appeals and by respondents.[54]

[54] It might be suggested that *Bell* v. *Burson*, one of the other due process cases relied upon by respondents, supports the view that the bail hearing is not a sufficient substitute for a preliminary hearing. The statute involved in *Bell* provided that the registration and driver's license of an uninsured motorist involved in an accident would be suspended unless he posted security for the amount of damages claimed. While a pre-suspension hearing was provided, it excluded any consideration of fault or responsibility for the accident. The Court held that before the State could deprive an individual of his license and registration, it must, in the prior hearing or in some other way, provide a forum before suspension for determining of whether there was a reasonable possibility of a final judgment being rendered against the driver whose license was to be suspended. *Bell*, somewhat like *Stanley* v. *Illinois*, *supra*, was thus concerned with the lack of consideration, in the pre-judgment suspension decision, of the issue of liability—the most relevent issue on the question of whether a final judgment would be rendered against the driver. In the criminal justice system, by contrast, probable cause to believe that the accused is guilty (the ultimate issue) is the crux of the prosecutor's charging decision; he does not blind himself to this as did the hearing officials in *Bell*. Moreover, the issue is again considered in conjunction with the release decision by the magistrate at the bail hearing.

C. THE BURDEN TO THE CRIMINAL JUSTICE SYSTEM OF REQUIRING A PRELIMINARY PROBABLE CAUSE DETERMINATION SIGNIFICANTLY OUTWEIGHS THE BENEFITS WHICH WOULD ACCRUE

As we previously have noted in another context,[55] it is appropriate to balance the supposed benefit which would accrue to the accused by requiring a probable cause determination by a judicial officer against the strain upon the criminal justice system that will be imposed by taking already overburdened court personnel and facilities away from the task of speedily disposing of cases at trial. A requirement of formal preliminary hearings in every case commenced by information would, we submit, be counterproductive.

Thus, with such preliminary determinations to be made in between four and five million misdemeanor cases alone (see *Argersinger* v. *Hamlin, supra,* 407 U.S. at 34, n. 4),[56] the goal of speedy trials inevitably will suffer. Moreover, if lay witnesses are required to be present for the probable cause determination, citizens will be required to spend yet another day waiting in courthouses for their opportunity to testify, at a time when lack of witnesses cooperation and the failure of victims even to report crime are becoming increasingly significant problems.[57] Even if only the hearsay testimony or affidavit of a police officer would

[55] See Argument I-C, *supra.*

[56] See note 40, *supra.*

[57] See, *e.g.*, President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: *The Courts* 90–91 (1967).

be required (see Fed. R. Crim. P. 5.1), there is a significant burden on the law enforcement system, since the police will have to devote additional time in court that could be better spent in active prevention and investigation of crime. Additional facilities, judicial officers and lawyers (both prosecution and defense) will also be required. See Note, *supra,* 83 Yale L. J. at 789–790, nn. 82, 83.

When one considers that in many jurisdictions the magistrate finds a lack of probable cause in very few cases (less than four per cent, for example, in the District of Columbia),[58] it may be doubted that it is wise to devote a significant portion of the resources of the system to time-consuming preliminary hearings. Due process of law would more surely be achieved if the prosecutor devoted his limited resources to assuring a fair charging decision, the magistrate directed his efforts toward making an informed bail determination, and the court devoted its time to affording the accused a prompt and fair trial on the merits.

[58] See note 41, *supra.* See also Miller, *supra,* at 64–109.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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